SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 657

CARL HUNT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Missouri

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri

Petitioner Carl Hunt prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered in the above entitled case on June 8, 1970.

OPINION BELOW

The opinion of the Missouri Supreme Court is unreported to date but is reproduced in the appendix to this petition (Appendix A).

JURISDICTION

The final judgment of the Supreme Court for the State of Missouri was entered on June 8, 1970. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 2104.

QUESTION PRESENTED

Has the Supreme Court of Missouri deprived the petitioner of the protection afforded him through the Fourth Amendment of the Constitution of the United States in holding that the uncorroborated statements of a heroin addicted affiant afforded the search warrant issuing judge a substantial basis for his finding of probable cause as the affiant's assertion concerning the theft of items delivered to petitioner's place of business was pure hearsay?

STATEMENT

Petitioner Carl Hunt was indicted on October 17, 1967 for receiving stolen property in the amount of $50.00 or over. The basis for issuance of said indictment was the fruits of a three-hour search of Mr. Hunt's business, C & H Auto Parts, located at 2420 Hadley, St. Louis, Missouri, conducted under a search warrant issued on September 22, 1967 by Circuit Judge Waldo C. Mayfield.

Judge Mayfield issued search warrant to police Sergeant Lloyd Altemus upon Sergeant Altemus' information and belief that certain socket wrenches and tools taken in a burglary of Murray Motors, 4879 Natural Bridge, were housed in the building at 2420 Hadley.

To support this information and belief, Sergeant Altemus presented the affidavits sworn before Judge Mayfield of two witnesses: Frank Gollhofer, the manager of Murray Motors, and one George Michael Hoffman.

Gollhofer's affidavit simply asserts that between September 5 and September 6, 1967 the garage and office of Murray Motors was burglarized and he listed items that were missing from his employer's place of business.

Since neither Sgt. Altemus nor assisting Officers Reeves and Davis had any personal knowledge concerning the whereabouts of the proceeds of the Murray Motors burglary (Tr. 134), it was then incumbent upon the reviewing judge to rely fully upon George Michael Hoffman's affidavit.

Affiant Hoffman's affidavit reads as follows:

> "Comes now George Michael Hoffman and states that on September 6, 1967, I saw one James Reynolds, alias Frankie Lyman, who I have known for 12 or 15 years. I saw him about 9:00 or 10:00 A. M. on that morning and he said he had some pieces he wanted to sell and he had just left Joe's, a fence, and that Joe would not give him a decent price for these pieces. He asked me if I knew where he could get rid of them and I told him yes, and we then went to a building located at 2420 Hadley Street, known as C & H Auto Parts, run by a Carl Hunt, and we both carried into that building two small tool boxes, red in color, one battery charger, an empty tool chest, a comptometer machine and various loose hand tools, including an impact wrench, and various snap-on tools, which included wrenches and sockets and also some screw-drivers. We carried the battery charger and two tool boxes into the body shop of the building, with an entrance on North Market, and we carried the other tools and the comptometer machine into the motor shop part of the building, which has its entrance on Hadley Street.
>
> "A week or so later I was riding in an automobile with James Reynolds and we passed Murray Motor Company at 4870 Natural Bridge, and James Reynolds told me he had gotten all the above described property from that company. He referred to Murray Motors and said that he had 'beat' them, which is an expression that means he stole them."

On April 5, 1968, a hearing to suppress the evidence obtained in the search of C & H Auto Parts was heard before Judge Mayfield. At said hearing Sgt. Altemus testified that George Hoffman had not been an informer for him prior to September 22, 1967 and that to his knowledge he had not been an informer for any other police officer. Altemus, likewise, testified that any knowledge he had concerning items missing at Murray Motors came from George Hoffman. Judge Mayfield denied petitioner's application to suppress the product of the search warrant in full (Motion to Suppress, Tr. 25-29).

Petitioner renewed his objection to the product of the search at the trial, wherein the trial Judge complied with the ruling of his fellow Circuit Judge (Tr. 97).

Additional evidential information was obtained from Hoffman concerning his affidavit at the subsequent trial of this cause. Hoffman admitted prior felony convictions for drug addiction and possession of narcotics (Tr. 240). Hoffman testified that at the time of the search warrant application, he had charges pending against him for the sale of narcotics and for carrying a concealed weapon (Tr. 284). On the day Hoffman executed the affidavit before Judge Mayfield he was suffering drug withdrawal symptoms, having "shot" 15 heroin capsules the previous day (Tr. 261). Hoffman was given thorezin pills and medication immediately subsequent to the filing of his affidavit (Tr. 301).

On May 3, 1968, the jury returned its verdict of guilty as charged. On May 10, 1968, petitioner's punishment was assessed at the maximum, 10 years. On June 18, 1968, the trial court overruled the motion for a new trial and formally sentenced appellant Hunt to ten years in the Department of Correction.

REASONS FOR GRANTING THE WRIT

Freedom from unreasonable searches and seizures is granted in the Fourth Amendment to the Constitution which provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects shall not be violated and **no warrants shall issue but upon probable cause** supported by oath or affirmation particularly describing the place to be searched and the persons or things to be seized" (Emphasis added).

Petitioner Hunt complains most bitterly that his rights as guaranteed under this Fourth Amendment were denied him by Judge Mayfield's issuance of said search warrant in the complete absence of probable cause for such action.

This Court in its two most recent decisions in this area has gone to great lengths to formulate guidelines which judges must follow in the issuance of search warrants.

In **Aguilar v. Texas**, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, two police officers submitted an affidavit which stated:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and used contrary to the provisions of the law." 378 U. S. 108, 109.

Based upon this affidavit a search warrant was issued in the Aguilar proceeding. Bearing in mind that Sgt. Altemus did not make the representation that Hoffman was credible and being mindful that the information submitted to Judge Mayfield concerned itself with the location of

items stolen some sixteen days prior to the search warrant application, petitioner urges that the affidavits in the case at bar fall short of that which was presented to the Magistrate in the Aguilar proceeding. Speaking through Mr. Justice Goldberg, this Court spoke with regard to the constitutional requirements for obtaining a state search warrant:

> "Although the reviewing Court will pay substantial deference to judicial determinations of probable cause, the Court must still insist that the Magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police . . . Magistrate here certainly could not judge for himself the persuasiveness of the facts relied on . . . to show probable cause. He necessarily accepted without question the informant's suspicion, belief on mere conclusion . . . The search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and that the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial." 378 U. S. 115, 116.

While bearing in mind in the instant case Sgt. Altemus had to rely solely upon the statement of George Hoffman, a narcotics addict whose credibility was certainly questionable and that he was required to hope that the passage of sixteen days did not result in the relocation of goods that may have come from Murray Motors, a finding of probable cause seems remote. A statement made by Judge Mayfield at the hearing on a motion to suppress the fruits of the search casts grave doubt as to whether he was indeed performing his neutral and detached function as demanded by Justice Goldberg or was serving merely as a rubber stamp for the police:

> "These men who have testified are police officers, they are men sworn to uphold the law and they

> are not totally inexperienced. You men are not rookies, you are not beginners, and I'm sure not going to set myself up as a little God in street clothes, that I know more than they do about how to enforce and practice our criminal laws. I rely upon, a whole lot upon, the reliability of these officers and their judgment" (Motion to Suppress, Tr. 26, 27).

This Court in **Spinelli v. U. S.**, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637, emphatically insisted upon the exercise of an independent and neutral judgment by a detached magistrate before a search warrant may issue. Speaking through Mr. Justice Harlan, this Court said:

> "Applying these (Aguilar) principles to the present case we must first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was 'reliable' he offered the magistrate no reason in support of this conclusion. Perhaps more important is the fact that Aguilar's other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI source received this information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable." 393 U. S. 413, 414.

Mr. Justice Harlan has therefore told us that when an informant is utilized in the issuance of a search warrant, the issuing Magistrate is to utilize three criteria in evaluating such evidence: (1) Said informant must be

shown to be credible and reliable. (2) The source of the informant's information must be shown. (3) Said source must be shown to be credible and reliable.

Petitioner respectfully submits that the facts surrounding the issuance of the search warrant in the instant case fall terribly short of meeting these three criteria.

The facts presented as they relate to informant Hoffman's credibility are:

(a) He was not a known police informant. He had in fact never supplied the police with any previous information (Motion to Suppress, Tr. 8).

(b) He was a narcotic addict who was "hooked" at the time of his arrest and had in fact taken 15 to 20 Heroin capsules on the day of his arrest (Tr. 261).

(c) On the day he was presented to Judge Mayfield to swear out his affidavit he was suffering severe drug withdrawal symptoms and was given medication only subsequent to the swearing of said affidavit (Tr. 299).

The second criteria was met in the instant case when the source of Hoffman's information was alleged by him to be an associate of his, one James Reynolds, alias Frankie Lyman.

But the third criteria calls for the source of Hoffman's information to likewise be shown to be credible and reliable, and once again the facts as presented in this case fall woefully short of meeting that criteria: First, Reynolds was not shown to have been known to either the police or to Judge Mayfield as a reliable source of information; secondly, Hoffman obtained this information through a chance remark made to him by one Reynolds (Tr. 303).

Petitioner respectfully submits that the Missouri Supreme Court erred in distinguishing this case from the **Aguilar** and **Spinelli** cases when it stated:

> "The fact that the affidavits in this case expressed the requisite evidential basis for a finding of probable cause distinguishes this case from the cases of Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 723, and Spinelli v. U. S., 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637. In those cases affidavits for search warrants, found insufficient, showed that they were based upon information received from unidentified informers. **The problem in those cases was the extent to which the magistrate might rely upon such information in determining the existence of probable cause. That question is not presented in a case such as this where the application displays an evidential basis for a finding of probable cause**" (emphasis added) (Appendix A, page 4).

Petitioner submits that the very same question exists in this case that existed in the **Aguilar** and **Spinelli** cases: The problem is to what extent a magistrate may rely on an informant's tip. Whether that informant is unnamed or is a narcotics addict who is presented before a magistrate while enduring severe withdrawal symptoms are but factors to be weighed by the magistrate and not a basis distingushing the two cases. The Missouri Supreme Court states that an evidential basis for a finding of probable cause over and above informant Hoffman's tip existed. The facts are quite clear that Hoffman's affidavit was the sole basis for Judge Mayfield's issuance of the search warrant. The police had no knowledge concerning whereabouts of the proceeds of the Murray Motor burglary. There was no evidence other than a statement by the manager of Murray Motors listing the goods stolen and informant Hoffman's statement presented to Judge Mayfield for his consideration.

Petitioner can state his cause no more eloquently or succinctly than did Mr. Justice Douglas in U. S. v. Draper, 358 U. S. 307; 3 L. Ed. 327, 79 S. Ct. 329.

> "Here the officer had no evidence apart from the mere word of an informer that petitioner was committing a crime . . . If they went to a magistrate to get a warrant of arrest and relied solely on the report of the informer it is not conceivable that one would be granted."

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted

DANIEL P. REARDON, JR.
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St. Louis, Missouri 63101
Attorney for Petitioner

APPENDIX A

In the Supreme Court of Missouri
Division Number One

State of Missouri,
Respondent,
vs.
Carl Hunt,
Appellant.
No. 54,126.

Appeal from the Circuit Court of the City of St. Louis
The Honorable Robert G. Dowd, Judge

Appeal from 10 year sentence imposed by court under Second Offender Act after jury found Carl Hunt guilty of receiving stolen property of a value of over $50.00. § 560.270, R. S. Mo. 1959, V. A. M. S.

The property involved, consisting of mechanics' tools and socket wrenches, was taken from Murray Motors at 4870 Natural Bridge Road in St. Louis on the evening of September 6, 1967. On September 21, 1967, St. Louis police officers, acting under a federal narcotic "want" order arrested George Michael Hoffman. Interrogation of Hoffman by police revealed that he had knowledge of the Murray Motors theft. On September 22, 1967, Hoffman was taken by police officers to the circuit attorney's office and an application for a search warrant was prepared.

The application for the warrant was made by Sergeant Lloyd Altemus of the police department. His application recited that, "upon information and belief," certain described items stolen from Murray Motors were in a building located at 2420 Hadley Street in St. Louis. The application recited that the basis of the affiant's information and belief was two attached affidavits of witnesses. The

two attached affidavits were made by Frank Gollhofer and George Michael Hoffman. Gollhofer was manager of Murray Motors and his affidavit described the property stolen from Murray. Hoffman's affidavit stated:

"Comes now George Michael Hoffman, and states that on September 6, 1967, I saw one James Reynolds, alias Frankie Lyman, who I have known for 12 or 15 years. I saw him about 9:00 or 10:00 A. M. on that morning and he said he had some pieces he wanted to sell and he had just left Joe's, a fence, and that Joe would not give him a decent price for these pieces. He asked me if I knew where he could get rid of them and I told him yes, and we then went to a building located at 2420 Hadley Street, known as C & H Auto Parts, run by a Carl Hunt, and we both carried into that building two small tool boxes red in color, one battery charger, an empty tool chest, a comptometer machine, and various loose hand tools, including one Impact wrench, and various Snap-On tools, which included wrenches and sockets, and also some screwdrivers. We carried the battery charger and two tool boxes into the body shop part of the building, with an entrance on North Market, and we carried the other tools and the comptometer machine into the motor shop part of the building, which has its entrance on Hadley Street.

"A week or so later I was riding in an automobile with James Reynolds and we passed the Murray Motor Company at 4870 Natural Bridge, and James Reynolds told me he had gotten all the above described property from that company. He referred to Murray Motors and said that he had 'beat' them, which is an expression that means that he stole them. * * *"

The affidavits and the application were sworn to before Judge Waldo Mayfield of the St. Louis Circuit Court. The named affiants appeared before Judge Mayfield on

the afternoon of September 22, 1967, and, upon consideration of the application and the supporting affidavits, Judge Mayfield ordered a search warrant for premises at 2420 Hadley Street to be issued. The warrant was executed by police officers in a three-hour search, beginning around 3:00 P. M., September 22. The articles upon which the charge was based were discovered in the premises covered by the warrant. The premises were occupied by C & H Motors. Appellant Carl Hunt, the owner of C & H Motors, was on the premises when the warrant was served. When some items of the Murray theft were found, Hunt was placed under arrest. He was subsequently indicted for the offense for which he was convicted.

On this appeal the issues relate to the validity of the search warrant and its execution. Appellant's first contention is that there was an "absolute absence" of probable cause to authorize the issuance of the search warrant. Criminal Rule 33.01(a), V. A. M. R., authorizes the issuance of a search warrant for the recovery of stolen personal property.

"The Rule contains two situations in which a search warrant shall issue. The first situation exists upon the filing of a complaint for search warrant which is verified by oath or affirmation of the complainant and which states facts positively and not upon information or belief. The second situation exists when the complaint is supported by written affidavits stating evidential facts from which the judge determines probable cause. In the first situation, the verified statement of positive facts empowers the court to issue the search warrant; in the second, the the court determines probable cause for issuance of the warrant from the facts contained in the complaint and from the affidavits or other evidence submitted to support the complaint. * * *" State v. Taylor, Mo. Sup., 391 S. W. 2d 929, 932.

State v. Taylor involved a search warrant issued on an application verified by affidavit which stated positively that certain stolen property was held at a specified location. Here the application was verified on information and belief, but it was supported by affidavits, stating evidential facts. Gollhofer's affidavit established the fact that the property had been stolen. Hoffman's affidavit supplied the fact of the disposition of the stolen property. The Gollhofer and Hoffman affidavits supplied an adequate basis for the judge who issued the search warrant to determine the existence of probable cause for his exercise of such power.

The fact that the affidavit in this case expressed the requisite evidential basis for a finding of probable cause distinguishes this case from the cases of Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 723, and Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637. In those cases affidavits for search warrants, found insufficient, showed that they were based upon information received from unidentified informers. The problem in those cases was the extent to which the magistrate might rely upon such information in determining the existence of probable cause. That question is not presented in a case such as this where the application displays an evidential basis for a finding of probable cause. The affidavits permitted the circuit judge to "judge for himself the persuasiveness of the facts relied on * * * to show probable cause." Giordenello v. United States, 357 U. S. 480, 486, 78 S. Ct. 1245, 2 L. Ed. 2d 1503. See Aguilar v. Texas, 378 U. S. at 112-114. The affidavits afforded a substantial basis for the circuit judge to conclude that the stolen property was located at 2420 Hadley Street.

Appellant's attack here is premised, to a considerable degree, on the lack of credibility which he affords Hoff-

man. He suggests that the police should have shown that Hoffman was a "reliable" informer. Again, when the reliance is upon an unidentified informer, some such corroboration is insisted upon. However, Hoffman's identity was revealed. Although Hoffman testified at the trial that he was addicted to narcotics and was suffering from withdrawal symptoms when he executed the affidavit, his personal appearance before the issuing judge gave that judge an opportunity to observe the affiant. The judge's acceptance of the affidavit refutes the contention that Hoffman was suffering from withdrawal symptoms to the extent that he was not a reliable affiant. Furthermore, his knowledge of the theft from Murray and of the articles involved afforded a measure of corroboration.

Nor is the validity of the warrant affected by Hoffman's testimony to a somewhat different version of the Murray theft at appellant's trial. At the trial, Hoffman testified that he was an actual participant in the taking of the tools and equipment from Murray Motors. Probable cause for the issuance of a search warrant must be judged on the basis of what was before the issuing judge. McCreary v. Sigler, 406 F. 2d 1264, 1268(11) (8th Cir.); Aguilar v. Texas, 278 U. S. at p. 109, n. 1. Hoffman's testimony at the trial was not so entirely inconsistent with his affidavit in support of the search warrant as to destroy its validity.

Appellant also refers to a statement of the issuing judge on the hearing to quash, in which the judge stated:

"[T]hese men who have testified here are police officers, they are men sworn to uphold the law, and they are not totally inexperienced. You men are not rookies, you are not beginners, and I'm not going to set myself up as a little god in street clothes, that I know more than they do about how to enforce and practice our criminal

laws. I rely upon, a whole lot upon the reliability of these officers, and their good judgment."

This statement must be considered in the context in which it was made. In making the statement, the court was considering the charge that the warrant was not based upon information from a reliable source. The only witnesses on the motion to quash were police officers. The judge's expression of confidence in them cannot be taken as an admission that judicial discretion was not employed in determining the existence of probable cause for the issuance of the warrant.

We find the search warrant was valid.

Appellant contends that his motion to quash should have been sustained because the officers who executed the warrant failed to file an inventory of the property seized and a return following the search, as required by Criminal Rule 33.02, V. A. M. R. The rule does require the officer serving a search warrant to make a return, accompanied by a written inventory of any property taken. The court file on the search warrant bore a notation, dated September 22, 1967, "Return and inventory filed." However, neither the return nor the inventory appeared in the file. At a hearing before Judge Buder, on February 21, 1968, on defendant's motion to quash the search warrant and suppress the evidence obtained through its use, defendant's attorney became aware of the absence of the return and inventory. Judge Buder did not rule on the defendant's motion, but transferred the matter to Judge Mayfield, who heard the motion and overruled it on April 5, 1968. Defendant did not amend his motion to seek relief on the grounds of the absence of the return and inventory. Nor does the record show any request, as authorized by Rule 33.02, supra, by the defendant to the judge for a copy of the inventory.

After the trial had begun, the trial court again took up the motion to suppress. Defendant at that time raised, for the first time, the question of lack of the return and inventory. The court denied the motion, concluding that "the return is a ministerial act and would not invalidate the search warrant and the seizure thereunder." This conclusion of the trial court was probably based on the case of State v. Struce, Mo. Sup., 1 S. W. 2d 841, 843-844[9], which the circuit attorney cited to the trial court in defense against defendant's motion.

On this appeal, appellant offers no authority in support of his contention that the trial court's ruling on this question was erroneous. The trial court's ruling is, in fact, supported by the decision of this court in the Struce case. In response to the objection that a search warrant was invalid for failure of the sheriff to make a return to the justice and to attach to the return an inventory of the articles seized (Laws of Mo., 1923, p. 244, § 25; § 4511, R. S. Mo. 1929), the court stated (1 S. W. 2d 844):

"* * * The questions here raised involve the neglect of ministerial duties on the part of officers, and we have held that the failure * * * to perform such duties did not render the search warrant invalid."

Similar conclusions have been reached in other jurisdictions under statutory requirements for a return and inventory. Such was the conclusion in United States v. Callahan, D. C., M. D., Pa., 17 F. 2d 937, 941-942[5], in which the court collects several other federal decisions to the same effect. Subsequent federal decisions reach the same conclusion. Evans v. United States, 6th Cir., 242 F. 2d 534, 536[4, 5], cert. den., 353 U. S. 976, 77 S. Ct. 1059, 1 L. Ed. 2d 1137; United States v. Haskins, 6th Cir., 345 F. 2d 111, 117[12]; United States v. Averell, D. C., E. D., N. Y., 296 F. Supp. 1004, 1014[15, 16]; United States v. Birrell, D. C., S. D., N. Y., 269 F. Supp. 716, 720; United

States v. Gross, D. C. S. D., N. Y., 137 F. Supp. 244, 248 [9, 10].

Earlier federal cases tending to support the position of appellant here, such as Giles v. United States, 1st Cir., 284 F. 208, 215[3, 4], and Murby v. United States, 1st Cir., 293 F. 849, 852-853[4, 5], do not appear to have been followed. See United States v. Greene, D. C., D. C., 141 F. Supp. 856, 858[1, 2]; United States v. Clark, D. C., S. D., Ala., 298 F. 533, 534[1]; Giacolone v. United States, 9th Cir., 13 F. 2d 108, 109[3].

Cases in other state appellate courts hold that failure to comply with statutory requirements for a return or inventory does not invalidate the search and the evidence seized. People v. Phillips, 163 C. A. 2d 541, 329 P. 2d 621, 625[8]; State v. Brochu, Maine, 237 A. 2d 418, 424 [13]; State v. Sherrick, 98 Ariz. 46, 402 P. 2d 1, 8[13], cert. den., 384 U. S. 1022, 86 S. Ct. 1938, 16 L. Ed. 2d 1024; Garcia v. Texas, 164 Tex. Cr. App. 273, 298 S. W. 2d 831, 832[2]; Daltwas v. Texas, Tex. Cr. App., 375 S. W. 2d 732, 734[2].

The theory of such cases is that the procedural requirements in connection with search warrants are designed to safeguard the constitutional protection against unreasonable searches and seizures. Once the magistrate had determined that probable cause for issuance of the warrant exists and the warrant is properly executed, the failure of the officer to perform some subsequent duty does not nullify his prior valid and legal acts. See United States v. Clark, supra.

United States v. Gross, supra, demonstrates that requirements for a return and inventory, such as prescribed by Supreme Court Rule 33.02, V. A. M. R., are not to be ignored. The court there, in speaking of Rule 41 (d) of the Federal Rules of Criminal Procedure, which is practically identical with Supreme Court Rule 33.02 in requiring a return and inventory stated (137 F. Supp. 248):

"* * * Nevertheless the failure to comply with the requirement of Rule 41. (d) cannot be disregarded. To sanction non-compliance with the statute [sic] would result in nullifying its purpose."

The court ordered that a return and inventory be filed within ten days. Such a remedy would have been available to appellant had he seen fit to question the validity of the search and seizure on such grounds when the absence of a return and inventory first came to his attention. He did not raise the question until after the trial had begun, the jury sworn and some witnesses had been heard.

Appellant, furthermore, has not demonstrated that he was prejudiced by the absence of the return and inventory. He does not question that the items upon which his conviction was based were in fact found at his place of business. He merely questions how they got there. Defendant's witnesses testified that the tool boxes introduced in evidence "look like" those seized by the officers in their search.

Under all of the circumstances, we find no error in the ruling of the trial court.

Judgment affirmed.

Robert R. Welborn
Commissioner

Houser, C., Concurs
Higgins, C., Concurs
Per Curiam: The foregoing opinion by Welborn, C., is adopted as the opinion of the Court.
Seiler, P. J., Holman, J., and Riederer, Sp. J., concur; Bardgett, J., not participating because not a member of the Court when case was submitted.

APPENDIX B

(Letterhead of Clerk of the Supreme Court, State of Missouri, Jefferson City, Missouri)

June 8, 1970

Mr. Daniel P. Reardon, Jr.
216 Buder Bldg.
7 N. 7th St.
St. Louis, Missouri 63101

In re: State v. Carl Hunt
No. 54126

Dear Sir:

The Court made the following order in the above case on this day:

"Appellant's motion for rehearing or, in the alternative, to transfer to Court en Banc overruled."

Yours very truly

Marion Spicer
Clerk